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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID JOHNELL JONES, Defendant and Appellant.	B147578 (Super. Ct. No. VA055861)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman P. Tarle, Judge. Affirmed as modified.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, and Michael C. Keller, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant, David Johnell Jones, appeals from the judgment entered following his conviction, by jury trial, for first degree murder with firearm use enhancements (Pen. Code, §§ 187, 12022.53, 12022.55).[1] Sentenced to a state prison term of 50 years-to-life, he claims there was trial error. The People contend there was sentencing error.

The judgment is affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Lydia Aguilar lived in Bellflower across the street from the Curbelo family. In July 1999, she witnessed an antagonistic encounter between defendant Jones and Johnathan Curbelo. She saw Jones take a fighting stance and ask Curbelo about some things he had been saying. Aguilar and her husband intervened and Jones left.

On August 25, 1999, two people who lived near Curbelo, Mali Green and David Garcia, were approached by Jones, Shaun Camu, and two others. Jones said, "Let's go down to the corner to jump these fucking Mexican kids that keep mad dogging us." Green declined. Later that day, Green saw Jones's group arguing with Curbelo and his friends outside the Curbelo house. At some point, Jones said, "Fuck this. I'm going to

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[1] All further statutory references are to the Penal Code unless otherwise specified.

go get my .380." Jones and his friends left the area. When they returned, Curbelo and his friends were gone. After showing Green a gun, Jones announced: "If these fucking Mexicans mess with me, I'm going to cap them." When Green subsequently saw Curbelo, Fernando Raygoza and Rudy Padilla, he warned them that Jones had a gun and had said he would shoot them. Showing no concern about the gun, Curbelo and his friends said they wanted to fight.

That night, Camu and Chris Frey borrowed a white Jetta that belonged to the girlfriend of Jones's brother, Dramell. Camu and Frey drove around the Bellflower neighborhood looking for Curbelo and, after spotting him, went to tell Jones and Dramell. Jones, Dramell, Camu and Frey then drove back. Seeing Green, Frey asked, "Where are those fucking Mexicans? We're going to jump them." When Green looked inside the Jetta, he saw Jones sitting in the front passenger seat with his hand by his side as if he had a gun. Curbelo and his friends were down the street. According to Frey, Curbelo was acting as if he had a weapon under his shirt. Frey saw Jones stand up through the Jetta's sun roof. Frey heard a gunshot and then he saw Jones sit down again with a gun in his hand. Curbelo died from a .380-caliber gunshot wound to the chest. The next day, Jones, Dramell and Frey went to the beach and Frey saw Jones throw pieces of a gun into the water.

Raygoza identified Jones as the gunman from a photographic lineup. At trial, Raygoza was unable to identify him, but he testified that the gunman was black and wore braids similar to Jones's braids.

CONTENTIONS

1. The trial court erred by failing to find that the prosecutor had impermissibly exercised a peremptory challenge based on race.

2. The trial court erred by refusing to dismiss a juror for misconduct.

3. The trial court committed prejudicial error by instructing the jury with CALJIC No. 17.41.1.

4. The trial court erred in its award of presentence custody credits.

DISCUSSION

1. *Wheeler claim.*

Jones contends the trial court erred by failing to rule the prosecutor had exercised a peremptory challenge based on race in violation of *People v. Wheeler* (1978) 22 CaI.3d 258, 276-277. This claim is meritless.

During voir dire, Jones argued the prosecutor had challenged three prospective jurors because they were black. The trial court determined that prima facie showings of *Wheeler* error had been made out, but then accepted the prosecutor's explanations for challenging these jurors. Jones contends that, as to one of these three prospective jurors, the trial court erred.

"A party may not use peremptory challenges to remove prospective jurors solely on the basis of group bias. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People v. Fuentes* (1991) 54 Cal.3d 707, 713.) If the trial

court finds a prima facie case of group discrimination has been demonstrated, the burden shifts to the other party to explain why the peremptory challenge was not predicated on group bias. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 281.) An appellate court gives great deference to a trial court's ruling on the proffered explanation in reliance "on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*Id*. at p. 282.) The trial court must be satisfied the prosecutor's explanation is genuine. " 'This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . .' " (*People v. Fuentes*, *supra*, 54 Cal.3d at p. 718.) Where "the record reflects a conscientious determination by the trial court that the prosecutor predicated his peremptory challenges . . . upon his perception of an individual bias on the part of each juror, and not on the basis of group bias . . . [t]he record . . . fails to support defendant's claim of *Wheeler* error." (*People v. Sims* (1993) 5 Cal.4th 405, 431-432.)

Here, the prosecutor said he had challenged the prospective juror because "he was young. And I don't like young jurors on my cases. Especially when it involves a young defendant. [¶] I think there are a couple of reasons – the problem I have with youngish jurors is he might be looking at the defendant and think to himself that that guy is not much younger than I am. [¶] There may be sympathies. [¶] And also the problem I

have with them is when they are young like that I really don't think they have as sufficient stake in the community that other jurors have that have lived a little while longer and have experience." When the trial court remarked, "Of course he is married, with a job, and has 2 kids," the prosecutor replied: "I understand that. I took that into consideration and I still, in my opinion, I thought he was . . . too young, in my view, to sit on the jury." The prosecutor added he was uncomfortable because he had noticed the juror reading "magazines having to do with . . . what I view to be youthful cultures. [¶] Stuff like rap music, rap magazines, that sort of thing. Like Vibe, something like that. [¶] In my view, that is sort of the MTV generation and that is not the generation I want sitting on murder cases."

Age is a factor that may be properly relied on for making a non-discriminatory challenge. (See *People v. Sims, supra,* 5 Cal.4th at p. 430 [young people do not constitute a cognizable class for *Wheeler* purposes]; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 ["Limited life experience is a race-neutral explanation."]; see also *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 ["California courts have not been receptive to the argument that age alone identifies a distinctive or cognizable group within the meaning of [the representative cross-section of the community] rule."].)

Jones argues age was not a permissible explanation in this case because the record shows the trial court actually disagreed with the prosecutor's explanation. The trial court had ruled: "I did not view [the prospective juror] as being all that young, quite frankly. He is married with 2 kids and has a job and seems rather stable. [¶] But the question is

whether or not it was legitimate for counsel to make a decision based upon that basis. In my mind it is a real tossup. [¶] All in all, I think that the People's challenge was based upon a good faith belief that his youth was inappropriate for their case. [¶] And so I will accept that. I do believe it was made in good faith, although I would have to warn the People I would have to look very carefully at any further challenges with regard to juror's [*sic*] removal for that reason."

Thus, while this juror may not have struck the trial court as being inappropriately young, the court acknowledged the prosecutor could have reasonably reached a different conclusion. The trial court thereby satisfied its obligation to question the credibility of the prosecutor's explanation. (See *People v. Sims, supra,* 5 Cal.4th at p. 430 ["Although [the prospective juror's] immaturity cannot be verified from the cold record, absent a showing by defendant to the contrary we must 'rely on the good judgment of the trial court[]' to evaluate whether the prosecutor's reason was bona fide."]; *People v. Perez, supra,* 29 Cal.App.4th at p. 1328 [*Wheeler* motion properly denied, even though trial court said limited life experience explanation was tenuous, because trial court "ultimately found the explanation 'plausible' " and "[m]ore importantly, the trial court found the prosecutor credible on this point"].) The trial court's ultimate finding of good faith here is entitled to deference.[2]

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[2] Jones's reliance on *People v. Silva* (2001) 25 Cal.4th 345, is misplaced because the trial court there entirely failed to interrogate the prosecutor's explanation. "[W]hen the prosecutor gave reasons that misrepresented the record of voir dire, the trial court erred in failing to point out inconsistencies and to ask probing questions. 'The trial court has a duty to determine the credibility of the prosecutor's proffered explanations'

2. *Juror misconduct.*

Jones contends the trial court erred by refusing to dismiss a juror who had received extrajudicial information about the case. This claim is meritless.

On the second day of trial, juror number 10 advised the trial court that, over the weekend, a woman had spoken to her about the case while they were watching their sons participate in a sporting event. According to the juror, the woman said only that "[h]er nephew was shot [in Bellflower]. And she mentioned the drive-by shooting by a juvenile that was black." The woman did not say anything else. "She didn't get into details. She just said it was some kind of drive-by." When the trial court remarked, "The amount of information that you have given us, is about 5 seconds' worth or 10 seconds' worth. Was there actually some more conversation about this or – ," the juror replied, "No. I changed the subject. [¶] Like I said, I wasn't . . . sure exactly if I was supposed to tell her or not [about being a juror on this case]. So I just cut it off. And so I thought I would come today and ask." The trial court asked if the incident would affect her ability to be objective, and the juror replied: "Being I just met her, no. I don't see how that would – how I couldn't be impartial and fair." The court asked if the incident would make her worry that a not-guilty vote might lead to a future confrontation with the woman. The

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[citation], and it should be suspicious when presented with reasons that are unsupported or otherwise implausible [citations]. [¶] . . . Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent [citation], it is another matter altogether when, as here, the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court has failed to probe the issue [citations]." (*Id.* at p. 385.)

juror said no. The court then said, "The prosecutor has already made an opening statement, in quite some detail. Is there any information that you received from this woman that is different in any way from the information that [you] already heard from the prosecutor." The juror said no.

Defense counsel asked the trial court to remove the juror on the ground she might be influenced by the reference to a drive-by shooting. The prosecutor was concerned about the reference to the gunman being black. (There had been both black and white passengers in the Jetta at the time of the shooting.) But the prosecutor also said he did not have a strong feeling one way or the other as to whether the juror should be dismissed. The trial court said: "I feel comfortable in leaving her on the trial. But on the other hand, the question is, would it be just better to ask her to leave and not build in this kind of issue into the trial. [¶] Either side wish to be heard further on that?" When counsel submitted the issue, the trial court ruled: "My feeling – my initial reaction was to take her off, simply to avoid the problem. But I don't know that that is fair. [¶] It is clear to me that she – it may be just the opposite. She may be more fair than many of the other jurors, if I can characterize it that way. Because she was so concerned about bringing it up and she cut off the conversation. [¶] Which is the right thing to do. [¶] And she has demonstrated by her actions that she is very concerned about being fair and minimizing any contact. [¶] So I kind of feel that we have the right kind of juror, someone who is going to remain open-minded and deal fairly with both sides. [¶] I am going to leave her on the trial at this point. [¶] I see nothing in her demeanor, nor in the

way she answered, to indicate an inability to do that. And that she has gone out of her way at this point to try to insulate herself from that influence after being confronted by it. [¶] So all in all, I think in fairness, I am going to leave her on."

"Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. [Citations.] . . . [¶] We assess the effect of out-of-court information upon the jury in the following manner. When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant. If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict . . . ." (*People v. Nesler* (1997) 16 Cal.4th 561, 578-579.) "Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination." (*Id.* at p. 582.)

Here, there was no substantial likelihood the juror was biased against Jones. Although the woman she spoke to was apparently the victim's aunt, the woman did not suggest she had any special inside information about the case, nor did she say anything

that had not already been mentioned during the prosecutor's opening statement. Jones asserts the woman was "an intimate acquaintance of juror No. 10," and that their conversation "was considerably lengthier and more intimate than the juror's 30 minute bar room conversation requiring reversal" in *Nesler*. Neither assertion is correct. The evidence showed that juror No. 10 barely knew the woman, that she "had spoken with her from time to time but this was the first time [she] actually sat next to her at a game."

And their encounter was nothing like what happened in *Nesler*, where "Boje [the juror] went into a tavern and sat down at the bar. A woman sitting about two-thirds of the bar's length away from Boje said that she knew defendant and had babysat defendant's children. The woman said that defendant had used illegal drugs, had left her children on several occasions, and then had not come home, sometimes for days at a time. The woman was not speaking to Boje or to anyone else in particular, but rather to anyone who would listen, and she made derogatory comments concerning defendant for approximately half an hour. Boje did not respond to any of these comments or identify herself as a juror, and it did not occur to Boje to leave. At some point Boje went to the restroom, and when she returned the woman was gone." (*People v. Nesler*, *supra*, 16 Cal.4th at p. 572.)

Furthermore, the two jurors reacted very differently to their exposure to the extraneous information. In *Nesler*, Boje "did not disclose the outside information or its source to the court. Instead, Boje violated her oath and disregarded the trial court's instructions by revealing this information to other jurors. These disclosures were made

during deliberations, at a time when she disagreed with other jurors, in an apparent attempt to persuade them to change their views." (*Id.* at p. 579.)

On the other hand, juror No. 10 immediately brought the incident to the trial court's attention and, after questioning her, the trial court concluded that – far from having been biased by the incident – the juror had showed herself to be eminently fair.[3] Jones also argues "[t]he trial court . . . left her on [the jury] not because [it] found there was no 'substantial likelihood' of bias, but because the court believed it was not 'fair' to the juror." We cannot agree with this interpretation of the trial court's remarks. Rather, we think the trial court's point was that the juror's conduct – cutting off the conversation as soon as she realized the woman was talking about this case, and immediately reporting the incident to the court – demonstrated that she was just the sort of scrupulously fair person who should be on a jury.

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3 The extrajudicial reference to the gunman as a black juvenile is not particularly troublesome because Jones was not the only black person in the Jetta, and he was apparently considerably older than the white passenger the defense was trying to show had done the shooting. In any event, as *Nesler* teaches: " 'It is not required . . . that the jurors be totally ignorant of the facts and issues involved. . . . It is sufficient if the juror can lay aside his impression or opinion *and render a verdict based on the evidence presented in court*.' [Citation.]" (*People v. Nesler, supra,* 16 Cal.4th at pp. 580-581.) Thus, actual bias arises only where the juror is "unable to put aside her impressions or opinions based upon the extrajudicial information she received and to render a verdict based solely upon the evidence received at trial." (*Id.* at p. 583.)

3. *Anti-nullification instruction.*

Jones contends the trial court erred by giving the jury CALJIC No. 17.41.1 (duty to advise trial court if any juror intends to disregard the law). We conclude any error in giving this instruction was harmless.

"A jury has the 'undisputed power' to acquit, even if its verdict is contrary to the law instructed upon by the court and contrary to the evidence." (*People v. Fernandez* (1994) 26 Cal.App.4th 710, 714.) Nevertheless, California law disapproves of having the trial court inform the jury of its inherent power of nullification. (See *People v. Baca* (1996) 48 Cal.App.4th 1703, 1707 ["The California cases, while recognizing the jury's 'undisputed power' to acquit regardless of the evidence of guilt, reject suggestions that the jury be informed of that power, much less invited to use it."]; *People v. Partner* (1986) 180 Cal.App.3d 178, 185-186 [jury should not be instructed on jury nullification; although jury has raw power to disregard law, this power should not be legitimized by instruction]; see also *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1136-1137, fn. omitted [jury should not be instructed on nullification doctrine; rather, the jury "must itself identify the case as establishing a call of high conscience, and must independently initiate and undertake an act in contravention of the established instructions"].)

Using CALJIC No. 17.41.1, the trial court here told the jury: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to

deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." The constitutionality of this instruction has not yet been decided by the California Supreme Court. (But see *People v. Williams* (2001) 25 Cal.4th 441, 461-462 [jury nullification is contrary to ideal of equal justice because it allows verdicts based on whims of particular jury].) However, even assuming for the sake of argument that CALJIC No. 17.41.1 should not have been given, any error was harmless beyond a reasonable doubt. (See *People v. Molina* (2000) 82 Cal.App.4th 1329, 1336 [even assuming CALJIC No. 17.41.1 was given erroneously, reversal is unwarranted: "We will not infer that the jury instruction had any impact prejudicing defendant. We reject defendant's speculative assumption that the instruction had a chilling effect."].)

4. *Presentence custody credits*.

The People contend the trial court erred by awarding Jones 250 days' good time/work time presentence custody credits because section 2933.1, subdivision (c), mandates a 15 percent limit on such credits for someone convicted of murder. This claim has merit. Jones should have received only 75 days' conduct credit for the 500 actual days he spent in pretrial detention. We will order the trial court to correct this sentencing error.

DISPOSITION

The trial court is ordered to correct the award of presentence custody credit from 750 days (based on 250 days of conduct credit) to 575 days (based on 75 days of conduct credit), and to forward a certified copy of the amended abstract of judgment to the Department of Corrections. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.